Supreme Court, U.S.
FILED
AUG 23 1994

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

No. 93-2045

JAMES CITY COUNTY, VIRGINIA,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. ARMY CORPS OF ENGINEERS,

Respondents.

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, MARYLAND, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, VIRGINIA AND WYOMING IN SUPPORT OF PETITION FOR CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
DOUGLAS B. NOBLE
Acting Assistant Attorney General
LINUS MASOUREDIS
Deputy Attorney General
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-1263

(Additional Counsel on Inside Cover)

Attorneys for Amici Curiae

J. JOSEPH CURRAN, JR.
Attorney General of the State of Maryland

DON STENBERG
Attorney General of the State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada

JEFFREY R. HOWARD
Attorney General of the State of New Hampshire

MICHAEL S. EASLEY
Attorney General of the State of North Carolina

JAMES S. GILMORE, III
Attorney General of the State of Virginia

JOSEPH B. MEYER
Attorney General of the State of Wyoming

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INTEREST OF AMICI STATES	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. EPA MUST CONSIDER THE COUNTY'S WATER SUPPLY NEEDS AND THE ADVERSE WATER SUPPLY EFFECTS OF A SECTION 404(c) VETO	7
II. BY FAILING TO CONSIDER RELEVANT FACTORS, EPA IMPROPERLY AVOIDED AGENCY RESPONSIBILITY FOR A CONTROVERSIAL POLICY CHOICE	12
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Cases	
Bersani v. Robichaud 850 F.2d 36 (2d Cir. 1988) *cert. denied*, 489 U.S. 1089 (1989)	9
California v. United States 438 U.S. 645 (1978)	4
Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc. 467 U.S. 837 (1984)	5
Citizens to Preserve Overton Park, Inc. v. Volpe 401 U.S. 402 (1971)	12
Gregory v. Ashcroft 111 S.Ct. 2395 115 L.Ed.2d 410 (1991)	6
James City County, Virginia, v. U.S. Environmental Protection Agency and U.S. Army Corps of Engineers 955 F.2d 254 (4th Cir. 1992)	12
James City County, Virginia, v. U.S. Environmental Protection Agency and U.S. Army Corps. of Engineers 12 F.3d 1330 (4th Cir. 1993)	12
Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co. 463 U.S. 29 (1983)	12

TABLE OF AUTHORITIES CONT'D

	Page
New York v. United States 112 S.Ct. 2408 120 L.Ed.2d 120 (1992)	6
Federal Statutes	
33 United States Code	
§ 1251(g)	7
Clean Water Act	
§ 101(g)	4, 5, 7
§ 404(b)(1)	9
§ 404(c)	*passim*
Federal Regulations	
40 Code of Federal Regulations	
§ 230.3(q)	10
§ 230.5(c)	10
§ 230.10(a)	9
§ 230.10(a)(2)	10
44 Fed. Reg. 58076 (October 8, 1979)	8, 9, 11
Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for Specification, of an Area as a Disposal Site; South Platte River 54 Fed. Reg. 36862 (September 5, 1989)	4, 9
Proposed Determination to Prohibit the Use of Big River, Mishnock River, Their Tributaries and Adjacent Wetlands as Disposal Sites; Kent County, RI 54 Fed. Reg. 5133 (February 1, 1989)	4

TABLE OF AUTHORITIES CONT'D

Page

Federal Regulations Cont'd

Final Determination of Assistant Administrator for Water Pursuant to Section 404(c) of Clean Water Act Concerning Proposed Big River Water Supply Impoundment in Kent County RI, 55 Fed. Reg. 10666 (March 22, 1990) 8

Congressional Documents

S. Conf. Rep. No. 1236, 92d Cong. 2d Sess., reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* 7

Other Authorities

State of California, Department of Water Resources *California Water Supply Outlook* (July 7, 1994), p. 2 3

State of California, Department of Water Resources Draft Bulletin 160-93, *California Water Plan Update* Vol. I, p. 57 (June 1994) 3

QUESTION PRESENTED

Whether the Environmental Protection Agency, under section 404(c) of the Clean Water Act, can veto a public water supply project for which there was no alternative based solely on the adverse environmental effects of the proposed project without considering the adverse municipal water supply effects of its veto decision.[1]

---

[1] We have modified slightly the first question presented in the Petition for Certiorari to more closely track the argument and the specific interest of amici which is presented in this brief. This slight rephrasing does not materially alter the issue presented for review by petitioner.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

No. 93-2045

JAMES CITY COUNTY, VIRGINIA,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. ARMY CORPS OF ENGINEERS,

Respondents.

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, MARYLAND, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, VIRGINIA AND WYOMING IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICI STATES

The provision of water, like police and fire protection, is one of the most basic responsibilities of State and local government. Throughout the country, and particularly in parts of the arid West which have been suffering through protracted drought, the ability to construct water storage and transport facilities to

alleviate water shortages is crucial.[2] California still would be part of what early mapmakers called the "Great American Desert" were it not for the ability to bring water from where it is found in nature to where the people are.

Every dam, reservoir, impoundment structure, and water storage or diversion facility of any significance in this country requires a section 404 permit. Since such water supply projects of necessity must be built in waterways or water areas, they inevitably have adverse environmental aquatic impacts affording an opportunity for a section 404(c) veto. Accordingly, amici States have a vital interest in how EPA's section 404(c) authority is construed and applied.

---

[2] For example, in California, seven of the last eight years have been either dry or critically dry water years. See State of California, Department of Water Resources, *California Water Supply Outlook* (July 7, 1994), p. 2. The six year drought of 1987-1992 was comparable to the Dust Bowl era drought of 1929-34. State of California, Department of Water Resources, Draft Bulletin 160-93, *California Water Plan Update*, Vol. I, p. 57 (June 1994). The 1994 water year in California is shaping up to be the fourth lowest runoff year since record-keeping began at the turn of the Century. See *California Water Supply Outlook, supra*, p. 2. California's population is expected to increase to 49 million by 2020, and even with extensive water conservation, urban annual net water demand will increase by between 3.8 to 10.5 million acre feet. *California Water Plan Update, supra*, at 9. "By 2020, without additional facilities and improved water management, an annual shortage of 2.2 to 4.2 maf [million acre feet] could occur during average years depending on the outcome of various actions taking place to protect aquatic species." *Id.* at 394-395.

In many other States, including Virginia which is the State where petitioner James City County is located, severe water shortages have resulted in legislation to regulate groundwater and surface water withdrawals.

SUMMARY OF ARGUMENT

As this Court explained in *California v. United States*, 438 U.S. 645, 653-670 (1978), the history of water development is largely a history of co-operative federalism. From the Desert Land Act of 1877, through the Reclamation Act of 1902, down to section 101(g) of the Clean Water Act, Congress has recognized the primary role of the States in regulating and allocating water supply, and has sought to accommodate this historic State interest in federal regulatory programs. This case is a sharp departure from that tradition of cooperative federalism.

In upholding EPA's veto of James City County's water supply project, the Fourth Circuit has enshrined the rule that section 404(c) vetoes of water development projects can be based solely on environmental harm, and can completely ignore the countervailing State and local interest in municipal water supply. The Fourth Circuit's decision goes too far in reading in a narrow "single-issue" environmental concern into section 404(c).

To be sure, EPA's decision to ignore the County's water supply needs is surprising given that EPA has considered water supply needs in other section 404(c) determinations.[3] Moreover, section 404(c) expressly

---

[3] See EPA, *Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for Specification, of an Area as a Disposal Site; South Platte River*, 54 Fed. Reg. 36862, 36867-36868 (September 5, 1989); EPA, *Proposed Determination to Prohibit the Use of Big River, Mishnock River, Their Tributaries and Adjacent Wetlands as Disposal Sites; Kent County, RI*, 54 Fed. Reg. 5133, 5136 (February

refers to unacceptable adverse effects on "municipal water supplies", indicating that such adverse impacts were entitled to no less dignity than adverse effects on "wildlife". Section 101(g) also sets forth a policy of accommodating state water interests in implementing the Clean Water Act which hardly squares with the notion that water supply needs are irrelevant in making section 404(c) decisions.

But the core of amici's argument really has to do with agency accountability. In a case like this where there are no alternative sources of water supply, EPA faces a tough policy choice between wildlife protection and public water supply. In such circumstances, EPA must confront, not avoid that difficult policy choice, and must give a reasoned explanation why it chose one interest over the other. A necessary concomitant of deference to agency decision-making -- which is even more appropriate after *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) -- is the requirement that agencies explicitly make and articulate the reasons for difficult policy choices committed to their discretion under federal regulatory programs. Particularly here, where the slighted interest -- water supply -- is vital to State sovereignty and partakes of a venerable history of cooperative federalism, EPA should have explained why environmental harms outweighed the countervailing interest in municipal water supply which, in section 404(c), is just as preferred a resource or interest as wildlife.

1, 1989).

If the "clear statement rule" requires Congress to make explicit legislative choices on matters dear to State sovereignty, then requiring EPA's Assistant Administrator for Water to consider water supply needs and impacts in section 404(c) decisions is surely appropriate. EPA's laudable role in protecting wetlands and wildlife will not suffer by having it explain why these values outweigh the public's need for water.

The ultimate reason why EPA should confront the tough policy choice in this case, like the reason for the clear statement rule in general, is political accountability -- ensuring that federal decision-makers face controversial policy choices and the resulting electoral consequences, rather than avoid responsibility by crafting ambiguity in a statute, *Gregory v. Ashcroft*, 111 S.Ct. 2395, 115 L.Ed.2d. 410 (1991), or commandeering state officials to act in their stead, *New York v. United States*, 112 S.Ct. 2408, 120 L.Ed.2d 120, 145-146 (1992), or, as here, narrowly construing the factors deemed relevant to avoid responsibility for a controversial decision. Because EPA must explain to the people of James City County why wildlife impacts outweigh their need for water, and because the administrative law-federalism issue at stake goes beyond the confines of this case and section 404(c), this Court should grant the petition for certiorari.

ARGUMENT

I. EPA MUST CONSIDER THE COUNTY'S WATER SUPPLY NEEDS AND THE ADVERSE WATER SUPPLY EFFECTS OF A SECTION 404(c) VETO

Section 404(c) authorizes EPA to veto a section 404 permit when the proposed discharge will have an "unacceptable adverse effect" on certain listed resources or interests, including "municipal water supplies" and "wildlife." While the legislative history does not illuminate either the meaning of "unacceptable" or the methodology that EPA should use in exercising its section 404(c) authority,[4] the word "unacceptable" undoubtedly means that adverse effects must be measured against something and considered in context, not simply enumerated and deemed to justify a section 404(c) veto. Section 404(c)'s inclusion of "municipal water supplies" as one of the preferred resources to be protected by section 404(c), and the policy in section 101(g) of accommodating state water allocation systems in implementing the Clean Water Act[5] provide an

---

[4] See S. Conf. Rep. No. 1236, 92d Cong., 2d Sess., reprinted in 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* at 324-325; see also *id.*, at 177-178, 238-239.

[5] Section 101(g), 33 U.S.C. section 1251(g) provides:

> "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act

unmistakable statutory foundation for requiring EPA consideration of water supply needs in section 404(c) veto decisions.

EPA's regulations and past practice also demonstrate that "unacceptability" is not an absolute concept based solely on the magnitude of the adverse environmental effects, but is a relative term dependent upon context. First, EPA considered and analyzed water supply needs in the course of its section 404(c) proceedings on the proposed Two Forks Dam in Colorado, and the proposed Big River Reservoir in Rhode Island. See fn. 3, supra. Hence, the agency itself has recognized the relevance of water supply needs in determining whether to veto a proposed water supply project under section 404(c).

Second, EPA's practice has been to consider the existence of alternatives in assessing whether adverse environmental effects are "unacceptable."[6] If alternatives

---

shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." (Emphasis added).

[6] In promulgating its section 404(c) regulations, EPA stated: "those portions of the [section 404(b)(1)] guidelines relating to alternative sites may be considered in evaluating the unacceptability of the environmental impact." 44 Fed. Reg. 58076, 58078 (October 8, 1979); see also EPA, *Final Determination of Assistant Administrator for Water Pursuant to Section 404(c) of Clean Water Act Concerning Proposed Big River Water Supply Impoundment in Kent County RI*, 55 Fed. Reg. 10666 (March 22, 1990) ("EPA has determined that these impacts are avoidable because there are practicable alternatives available to meet projected water supply needs. These findings lead

are available, then a lesser magnitude of environmental harm is needed to reach the "unacceptability" threshold, because the existence of alternatives means that a veto would not necessarily preclude attainment of the project purpose. Conversely, if alternatives are not available, then EPA has at least implicitly acknowledged that a higher magnitude or quantum of environmental harm is needed to reach the "unacceptable" threshold.[7] In short,

---

to the conclusion that the discharge of dredged or fill material in connection with the proposed Big River Reservoir would result in unacceptable adverse effects to wildlife and recreational areas."); *Proposed Determination to Prohibit, Restrict, or Deny the Specification, or the Use for Specification, of an Area as a Disposal Site; South Platte River, supra,* 54 Fed. Reg. at 36866 (noting that those portions of the section 404(b)(1) guidelines "which are particularly important in evaluating the unacceptability of environmental impacts in this case are: - Less environmentally damaging practicable alternatives and special aquatic sites [section 230.10(a)]")

[7] See 44 Fed. Reg. 58078 ("the Administrator can take into account the fact that the alternative sites or methods are or are not available, so that the loss of resources is avoidable or unavoidable. Of course, even when there is no alternative available, and 'vetoing' the site means stopping a project entirely, the loss of the 404(c) resources may still be so great as to be 'unacceptable.'") (emphasis added). In *Bersani v. Robichaud*, 850 F.2d 36, 41 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989), the presence or absence of alternatives was determinative of whether adverse environmental effects were "acceptable" or "unacceptable", and whether a section 404(c) veto was proper or not. As the Second Circuit said: "if Pyramid began to search at a time *before* NED acquired options on the North Attleboro site, there definitely would have been a 'practicable alternative' to Sweeden's Swamp, and Pyramid's application should have been denied. On the other hand, if Pyramid did not begin its search until *after* NED acquired options on the North Attleboro site, then the site arguably was not 'available' and the permit should have been granted." (Italics in original, emphasis added).

the magnitude of environmental harm needed to reach "unacceptability" varies along a sliding scale, depending upon the presence or absence of alternatives in the particular case.

Moreover, the analysis of alternatives necessarily involves EPA in analyzing 1) economic feasibility factors, because only "practicable" alternatives are considered, see 40 C.F.R. sections 230.3(q), 230.5(c), 230.10(a)(2), and 2) project purpose, because one cannot begin to analyze alternatives without initially defining the project purpose and objective, see 40 C.F.R. section 230.3(q). Hence, under EPA's own regulatory methodology, the agency is inevitably drawn into analyzing project alternatives, purpose, and economic feasibility of alternatives when it makes a judgment whether any particular adverse environmental effect is "unacceptable."

Third, EPA has acknowledged at least implicitly that it will balance the adverse environmental effects of a section 404(c) veto against the adverse environmental effects of the proposed project.[8] If EPA considers the

---

[8] One of the commenters on EPA's proposed section 404(c) regulations posed a hypothetical wherein the environmental consequences of a section 404(c) veto might be worse than the environmental consequences of the proposed project. In response, EPA at least implicitly acknowledged that a section 404(c) determination would balance these two types of environmental harm: "One commenter expressed concern that 404(c) was not designed to handle emergencies, such as pipeline repairs, where the environmental consequence of vetoing the discharge might be worse than that of the discharge itself. EPA feels that the authority to 'restrict' rather than 'prohibit' can be used to handle this situation. For example, if a pipeline already crosses a site which is proposed to be barred as a disposal site in the future, the Administrator could simply restrict permissible discharges to those associated with

adverse environmental effects of a veto, then there is no reason why adverse municipal water supply effects of a veto should not also be considered since "municipal water supplies" is expressly mentioned along with "wildlife" in section 404(c).

In sum, environmental harm is not measured in an absolutist fashion based on some intuitive sense that a certain impact is simply "too much". Instead, environmental harm is a relative concept analyzed in the context of the particular project with due regard for project alternatives, project purposes, and adverse consequences of a section 404(c) veto. Such an analysis is not new or startling having been the norm under NEPA for years.

We make no claim that EPA must do a "cost/benefit" analysis before vetoing any type of project under section 404(c). Unlike shopping centers, roadways, and other private projects for which a section 404 permit is sought, municipal water supply has a special place in section 404(c) and implicates State sovereign interests. Consequently, requiring EPA to consider water supply needs and impacts in this case sets no precedent for requiring "cost/benefit" analyses in every future section 404(c) proceeding.

---

necessary pipeline repairs". 44 Fed. Reg. at 58081. (Emphasis added).

II. BY FAILING TO CONSIDER RELEVANT FACTORS, EPA IMPROPERLY AVOIDED AGENCY RESPONSIBILITY FOR A CONTROVERSIAL POLICY CHOICE

While EPA ultimately has the power to veto public water supply projects under section 404(c), its decision must be "based on a consideration of the relevant factors", *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and it cannot "entirely fail[] to consider an important aspect of the problem", *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.,* 463 U.S. 29, 43 (1983). As noted above EPA should have considered water supply needs and the adverse water supply effects of a veto in its section 404(c) determination. Instead, EPA labored to avoid the difficult policy choice between public water supply and wildlife, first, by straining to find water supply "alternatives" (which were more chimerical than real) which would purportedly solve the County's water shortage, and then by saying that the statute elevated environmental concerns over everything else and made water supply needs irrelevant. Even the Fourth Circuit shrank from the zero-sum choice between public water supply and wildlife because it speculated that there were water supply alternatives to the proposed project, see 12 F.3d 1330, 1334, n. 1 (4th Cir. 1993), even though it had earlier concluded that no alternatives were available. 955 F.2d 254, 259-260 (4th Cir. 1992).

Narrowly construing Congressional mandates to avoid deciding difficult policy trade-offs undermines the political responsibility and accountability of administrative

agencies. Agencies have to make explicit policy choices in the full light of day, particularly when interests vital to local communities and State sovereignty are at stake.

CONCLUSION

This case raises an important issue in the administration of the Clean Water Act. In light of the federalism and administrative law implications of the Fourth Circuit's decision, the Court should grant the petition for certiorari.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
DOUGLAS B. NOBLE
Acting Assistant Attorney General
LINUS MASOUREDIS
Deputy Attorney General

J. JOSEPH CURRAN, JR.
Attorney General of the State of Maryland

DON STENBERG
Attorney General of the State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General of the State of Nevada

JEFFREY R. HOWARD
Attorney General of the State of New Hampshire

(Additional Counsel on Next Page)

MICHAEL S. EASLEY
Attorney General of the State of North Carolina

JAMES S. GILMORE, III
Attorney General of the State of Virginia

JOSEPH B MEYER
Attorney General of the State of Wyoming

Attorneys for Amici Curiae